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"THE LAWYER" *

DEAN ROGERS AND FELLOW LAWYERS:

It would be ungracious for me not to express appreciation of the kind words of commendation which Dean Rogers has uttered. Following that, my next impulse is to present an apology, and in the apology to ask your kind indulgence.

Repose is something foreign to us in New York and the atmosphere of reflection that is so requisite to either original thought or research is unknown to us. I have come here this evening right from the midst of a whirl of excitement, and I am almost ashamed to confess to you that so far as preparation of either thought or ideas or arrangement of expression are concerned, I am unworthy to appear before you to-night.. I shall endeavor in the address that I will deliver, to speak to you as one lawyer to another, and to avoid all controversial subjects.

To-day our profession is almost a storm center, and I include in our profession the judiciary and the bar. In the popular arena of discussion grave questions have arisen which to many appear revolutionary and which, if carried into popular action by law, would certainly be revolutionary according to our system.

I incidentally mention the recall of the judges; the recall of judicial decisions, and, added to that, the apparent, if not real, popular discontent with legal methods.

The delay of the law particularly in the administration of justice has evoked from the President of the United States language

* Address given by the Honorable John W. Goff before the Faculty and Students of the Yale Law School under the auspices of the Chi Tau Kappa Society, February 28th, 1913.

so scathing that it would be difficult in polite words to excel it in intensity. He has characterized the administration of criminal justice in the United States as scandalous. The frequency with which great criminals have escaped punishment; the course of delay that has followed the litigation of great causes; the fertility of the legal mind in having recourse to all sorts of plans and schemes for the obstruction of the law—all these have presented causes which in the opinion of many persons, call for drastic action.

It is not the first time that popular feeling has expressed itself against the legal profession. Almost in the dawn of history we find that the legal profession has been inhibited, and in more civilized times it has been frequently made the subject of sarcasm—in "The Wasps" of Aristophanes, in which he held up the legal profession to most bitter ridicule and satire; taken up at a later day by Racine in his "Litigants", and more roughly treated by Wycherly in "The Plain Dealer", we have illustrations of the unpopularity of the profession of the law.

Some thinkers have ascribed that dislike and unpopularity to a jealousy on the part of the people at large because of the superior mental qualifications that the lawyers possess, and they have brought that into illustration by showing that a like criticism has been attached to the clergy. Voltaire, who happened to have been the subject of a bitter libel himself, became the most bitter of critics on the legal profession, though later on in life he admitted that one of his great regrets was that he had never studied for the bar. So that our position to-day is not new. Faults have always been found, very frequently justly, sometimes unjustly. The profession has always acquired great influence and attained a position of great importance in the affairs of nations. It has been looked upon as a blessing and infrequently as a scourge. Diodorous tells us that in ancient Egypt—the cradle of civilization—no lawyer was allowed to exist within the realm. He was regarded as an enemy of the state,—to use the historian's words: "The profession of the law was not allowed to be practiced because lawyers darkened the administration of justice." It is somewhat curious to note that all the ideal republics, or commonwealths that have been written of, from Plato's "Ideal Republic" down to Moore's "Utopia", prohibited lawyers from practicing as professionals, and indeed one sketch of an ideal community in the Southern Pacific, not many years ago, detailed the

occurrence of an island being settled by Utopians, and one of their first acts was to debar all lawyers; but, in the course of some years a ship was wrecked on the island coast, and some stragglers from the ship reached the coast, and the people, kindly disposed, helped them to land, and after they were warmed, clothed, fed, refreshed, and so forth, the natives commenced to inquire what their avocations in life were, and they all answered—some are merchants, some are mechanics; and the natives were all glad to welcome them. But one seemed to hesitate to announce his occupation in life; and when he was asked, he said, "Well, I am a lawyer"—and without any delay they took him out and hanged him.

As another instance of the popular feeling regarding the lawyer, some years ago, when the Volunteer Army of Great Britain was being organized, in the city of London, they instituted the custom of organizing regiments formed from the different professions and occupations, and one regiment was formed from solicitors' clerks, mostly law students, and whenever there was a parade of the Volunteers in London, a ribald populace always called out, when this regiment of lawyers came along, "Here comes the devil's own". Of course many of you know that it is quite a common custom there to call the regiments "The King's Own", "The Queen's Own", "The Prince's Own", and so forth, but, by popular acclaim, the regiment of lawyers was dubbed "The Devil's Own". Now, that is an illustration, expressed humorously, but nevertheless, having a serious import regarding the profession of which we are members. Of course it would be difficult for us to act as impartial judges upon our own case, but I think a fair examination of the situation would impel us to at least admit that there were grounds, possibly not wholly justifiable, but to a great extent partially justifiable. I think we to-day lose sight of the function of the lawyer at the birth of his creation. The earliest account we can find of the profession of the advocate had its place in Athens, and some writers claim that the origin of the Court constituting the lawyer an officer of the Court originated in this wise, in Athens: That around the buildings which we call Courts to-day, a number of men held themselves out to the service of the litigants coming in, particularly from the provinces, and their practices developed so many abuses that the Archons decided it was best to license them and bring them

under some control. These men that I speak of are known to-day as Police Court runners and pettifoggers; they are men without any standards of honor or honesty, and they take advantage of the innocence and ignorance of litigants and fleece them. When I speak of the present, I have of course the City of New York in mind, as I am not acquainted with the conditions in New Haven or cities like it. In the City of New York we are not without that class to-day. Many claim that the origin of licensed lawyers was a matter of necessity, a matter of protection that the judges devised for the purpose of bringing in the conscienceless and reckless men who fleeced the litigants, in order to have them under some sort of control or discipline; but at all events, we have historical proof that the first occupation of what we call an advocate to-day was that of men, polished scholars, who made a specialty of writing speeches to be delivered by the litigants. That became a profession, and the name that stands out more strikingly than any other in that line is Antiphon, who is the first recorded to have received fees, and it was claimed in the days of Demosthenes, that when he delivered his first great speech, when he was nineteen years old, accusing his guardians of embezzlement, Isæus wrote it for him. A class of professional men grew up as speech writers. There were no such things as lawyers *per se,* as we understand it; they were simply advocates, and the litigant who could come into Court and deliver a speech that had been memorized, or read it, considered himself very fortunate—so that the profession of speech writing became the basis of advocacy as we understand it to-day.

We find that for centuries there was a very clear line of demarkation drawn between the lawyer and the advocate. The duty of the advocate was simply to do what the name implies: to deliver speeches directed to affect the emotions of the judges, and to call forth the exercise of the softer and more sympathetic qualities of human nature. The lawyer was the expert in the law and went by the name of the *consulti,* and those two classes remained separate and distinct, until well on in the middle ages, when the lawyer—the term "lawyer"—embraced both avocations.

The most distinguished and famous law school in the middle ages was in France, and of all countries in the world, no country equaled France in its history with regard to the dignity of the advocate. There were more laws enacted in France regulating the practice of the lawyer, his duties and his obligations, than in

any country in the world, and in no country in the world has the lawyer, including the advocate, reached to such high degree of professional eminence as in France. Even in the days of that masterful monarch, Louis XIV,—and he did not like lawyers because they challenged his claim to prerogatives,—they attained to great eminence, and they for centuries were a distinct order, which was in itself an order of nobility, "The Nobles of the Robe." They took vows, just as the knights entering knighthood did, with solemn obligations, having application to the practice of their profession, and it would be interesting to compare the pledge of knighthood with the pledge of the lawyer. While the pledge of knighthood went on the line of personal bravery and chivalry, and so forth, the pledge of the lawyer went on the lines of the defense of rights, the protection from wrong, the succor of the afflicted, and above all things, never to refuse the case of a poor litigant. They had many privileges, and "The Nobles of the Robe" stood so high in popular estimation that they actually, like many of the guilds and professions of the middle ages, had one of their number canonized a saint, and to this day in France they recognize their patron saint, who was a great lawyer in his day, St. Ives of Brittany. Another of their number reached the papal throne, known as Clement IV. I speak of these instances merely to show to what high estate the lawyers in those days reached in France.

The order and privileges of the Bar, like other institutions, were swept away by the revolutionary edict of 1790, and the very name of advocate ceased to exist. It was clearly apparent that the purpose of the fanatics in the Convention was to proscribe all freedom of speech, for they dreaded the interference of the advocate with the bloody rule of the guillotine. As an act of favor, however, the King and Queen were allowed counsel, and in all history there is no more inspiring example of the courage and devotion of the advocate than that furnished by Malesherbes and his colleagues who, knowing that their words were spelling their own doom to the scaffold, denounced the contemplated murder of their royal clients.

In England the history of the Bar is familiar to us. One great difference between the profession of the law in England and the profession of the law in France was that the state did not interfere with the lawyers in England; the state interfered with the lawyers in France and regulated their conduct and pre-

scribed their duties, their obligations and their privileges, but in England the profession of the law was accorded a distinct and separate existence, which we know in our school books as the Inns of Court—they were regarded as having a separate corporate existence, so that they could admit to the Bar or dismiss from the Bar. The Courts exercised no disciplinary power over members of the Bar as such. That disciplinary power was and is exercised solely by corporations known as the Inns of Court. If a lawyer to-day in England is guilty of professional misconduct, he is not called before the bar of the Court, as with us, or as he would be in France, to answer for his misconduct, but he is called before the benches of his particular inn, and if they decide that he has committed an act unprofessional in its character or calculated to reflect upon his brothers, he is disciplined, and the Courts never question whatever punishment may be inflicted by the benches of the inn. It is the same all over Europe, with the exception of France and Germany. Our system to-day of course is that the Court exercises direct control over the lawyer, and if a lawyer has been guilty of misconduct or unprofessional methods, he must answer to the Court. That system has been found very cumbersome. The Courts are very busy with sharply contested actions between litigants, and they are not inclined to turn out of their way to consider a case of misdemeanor on the part of a lawyer. In the city of New York a condition has arisen which is worthy of very high praise. We have what is called a Bar Association. As matter of law the Bar Association has no disciplinary power over members of the Bar. Indeed it is a matter of election whether a lawyer belongs to the Bar Association or not, but a committee of that association, designated as a Committee of Grievances, have taken it upon themselves to call to the attention of the Supreme Court any unprofessional conduct or wrongdoing on the part of a member of the Bar. Their work has been exceedingly well done. I think within the past year they have presented some thirty complaints. When a complaint is made to the Justices of the Appelate Division, the practice is that the justices refer it to a special referee to take testimony, and if a proper case is made out, discipline follows. Recently the Court has disbarred quite a number. I am sure if you were acquainted with the New York Bar, or at least with certain members of the New York Bar, as well as I am, you would say to the Appellate Division of the Supreme Court, "may the good work go on."

I shall not attempt to speak to you upon the ethics of the profession, nor shall I be foolish enough to speak to you upon substantive law, for from your well equipped and able teachers you can get all of that knowledge that you are able to absorb, and as to the ethics of the profession, you no doubt will learn those and have a very good idea of them at the start; but there are a few things connected with the actual practice of the law that I will speak to you of with due deference to the teachers, because they are things that are rarely met with in books. After a pupil pores over his text books and makes his copious notes from his professor's instructions, and after he listens and almost memorizes the lectures, and he hears learned discourses on the rule in Shelly's case, and the law of attainder and other abstruse questions, very few students when they come into Court know how to make use of their knowledge. That old phrase of medieval French, *savoir faire,* the knowledge how to act, rarely is manifested by a young lawyer, no matter how well equipped he may be in his knowledge. I have had occasion to notice it so frequently—young gentlemen leaving their college with honor, well read, cultured, many of them of classical accomplishments, and yet in the actual practical application of their knowledge, they seem to be all at sea; and it has often occurred to me that if some generous and munificent patron of our seats of learning would found in our law colleges a chair of deportment and a chair for the instruction and inculcation of methods of practice, that the foundation would be well laid. I believe that in this State, and I know in the State of New York, it is required that even after a college course with a diploma, a student must spend a certain length of time in a lawyer's office. So far, so good, but I have seen young men who did not have the advantage of college training, who not only knew little law, but had very little general knowledge, who were coarse in grain and texture, and indeed might well be classified as grossly ignorant upon general questions, without any knowledge of literature or history or any polish whatever, who have proven themselves superior to the much more accomplished college graduate, that it has occasioned frequently an inquiry in my mind why this is. I have sympathized with the young man of parts and accomplishments and refinement, when I found he was not the equal in contests of skill and mental resources with his more inferior brother at the Bar, and it is a few things that may be of interest I will direct my

discourse to point out, and I am sure you will not take it unkindly from me as an attempt to be in any way professorial.

One of the first requisites of the young lawyer when he enters upon the practice of his profession is to have a fair and commensurate understanding of his obligations, and when it is considered what there is entrusted to his care,—all that is dear to mankind,—the protection of life, of liberty and of property,—that he is called upon to stand forth as the champion, not of the wrong, but of the right, he should fully appreciate those responsibilities and certainly have noble aims and ambitions. Unfortunately we must admit that in our day the wonderful spread of industrialism over the whole world has generated a commercial spirit, and that commercial spirit has invaded the profession that bore, as I before observed to you, the title of "The Nobles of the Robe," and many a young man enters the legal profession to-day as a commercial venture and not for the adoption of that high scale of ethics of which he should be the inheritor. Particularly in our great commercial centers is that true. The reports that some members of the Bar have received enormous fees from great corporations, have aroused a feeling of desire to enter into that profession where such great fees are obtained. Well, it is a matter of fact beyond question that but a comparatively small percentage of the members of the Bar reach that high grade of eminence to demand those fees. Indeed, a careful comparison of statistics compiled throughout our whole country shows that the mechanic averages per year more earnings than the average lawyer. It is true that we hear of some lawyers obtaining not only great fame in their profession, but great wealth as a reward for their talent; but any one of observation will have noticed in our great cities the hundreds of lawyers who have difficulty in making a living, and whose condition is really pitiable because they are not fit to work, not fit to do anything else, and they drag out a miserable existence, of no use or benefit to themselves and of a decided menace to the profession and to society at large. Young men should look this thing squarely in the face and appreciate the obstacles they have to surmount, for of all the professions, none is more exacting—I know not one that is as exacting—for the law has been called a jealous mistress, and she will not tolerate devotion to her severed or parted for any other object. An old teacher at Avignon laid down the rule that a law student should be a monk, that he should abstain from all the pleasures

of the table, that he should avoid all pleasures that would excite his imagination, and above all, that he should never look on the same side of the street upon which a fair maiden walked. It would be very difficult to carry those admonitions into effect to-day, but it goes to show the severity upon which in ancient times the study of the law was followed. There is no profession to-day whose expanse of knowledge is as wide as the lawyer's. There is no profession that has to cover so much ground, because in all other professions there is a special and specific subject pursued, but to the lawyer all knowledge is common. There is not a scrap of knowledge that may be picked up by the wayside that will not turn out useful some time or other. The law student should never neglect the opportunity to acquire knowledge upon all points. For instance, the inventor with his genius may be utterly incapable of explaining the mechanism of his invention, and a lawyer must do it for him. The dramatist who may write the most successful drama of the day would be utterly unable to defend his copyright, and a lawyer must do it for him. The lawyer must be conversant with the drama, the comedy and the tragedies of life.

I remember, if you will pardon a reminiscence, an experience that occurred to myself as a young practitioner. One day I was engaged in a case involving the construction of electric motors, and on the table before the bench there were a number of electric motors, and experts testifying concerning their construction. That was a very dry, uninteresting subject. In the case following I happened to be also engaged, and that case turned upon the culture of roses; so that on the table, where electric motors had been displayed in all their grimy rust and iron, there were strewn beautiful samples of the horticultural art—roses, suggesting romance and imagination. I speak of this to simply illustrate the wide range that the law takes. No law student should ever turn aside from whatever will yield him knowledge upon any subject, for he will never know the time when it will become valuable to him.

The lawyer enters Court in his first case of litigation. I spoke of deportment, and I assure you, my friends, that that means something more in the lawyer than mere politeness or suavity of manner. It is in Court that the lawyer must first make his name. There are very few young men who have not a heritage of wealth, family connections, or something of that kind, but who

must go into Court, because that is the arena after all of the lawyer, and the men who can in after years confine themselves to chamber work and who have acquired a reputation for wisdom and soundness in the law, must have earned their spurs in the arena, because it is in the arena that a great body of laymen receive their impressions of the lawyer. In the first place there is the jury. In the second place there is the audience in the Court room. Now it may not be thought very useful, but for a young lawyer to come into Court and handle himself any way that he pleases is a great mistake. Every juror who sits upon a case becomes, as it were, an advertising agent of the successful lawyer. Every auditor that sits in Court observes what the lawyer does, observes his conduct. The lawyer who starts in with an idea of aggression—that it is his business to fight for his client, and in fighting for his client to antagonize Court and jury, commits a mistake. That is the idea of many. The saying that it is a lawyer's duty to fight for his client until the last, is often taken to mean that he must create an atmosphere of hostility, and regard as an enemy the judge on the bench and the jurors in the box—that is, to antagonize and fight—and he thinks that the greatest accomplishment he can achieve is to impress his client and his client's friends with his pugnacity and ability to fight. If the young lawyer would only think—he may have a client for once; he may never have that client again, but he has to practice before the judge and in Court all his life, if he sticks to his profession, and is it worth while for a young lawyer, no matter how loyal he may be to his client, to imperil his whole life's success by needlessly and wantonly antagonizing judge and jury? The ethics of his profession do not call for it. All he is bound to do is to see that his client and his interests receive fair, just and legal treatment. What a tremendous mistake lawyers frequently make in thinking they can acquire an adventitious reputation for being bold and courageous by coming in and assailing the Court.

Let the lawyer first think of one great principle, the foundation stone of his professional life, that he himself is an officer of the Court; that he is a minister of justice, and that when the client for the time being has passed away from him and from his control, he yet remains a minister of justice. Oh, if that idea would only take firm root in the lawyer's mind; if he would only realize that his duty is to see that his client obtains all the law

accords to him, and that if he goes beyond that he does his client more harm than benefit and injures himself for life by constructing a reputation that will prove dangerous to him in after years!

The lawyer will frequently consider that his main purpose is to exploit himself. Self vanity generally is satisfied with very slight professional proficiency; egotism takes the place of what industry and persistence in study should supply. How many lawyers do we see come into Court who are actuated by one dominating idea and that is, not to win the client's case so much as to sound their own praises. Has it not often been noticed that the man who prides himself upon his eloquence will turn aside from addressing the jury and address himself to the audience in the Court; or, if there be a great many newspaper reporters, turn around and talk to the newspaper reporters. Here is the tribunal; here is the jury, the men who have to decide upon his client's case, and frequently they are lost sight of, and the governing idea is to be proclaimed as a great speaker, to be proclaimed as a bold and courageous man. In some forty years' experience at the bar, and I have heard very many great pleaders, I have never known one of that class to be successful.

Another variety of that class is the lawyer who will sooner make a sharp point than gain a substantial advantage for his client; that is, who will prefer to appear before a judge and jury and a great audience as an extremely sharp man, as a man who is so quick that he is altogether too much for his antagonist. Be assured, my friends, that that man will never be a successful lawyer for his clients, and this class of lawyers I speak of consider their clients secondary in interest to their own reputation and to their own interests.

One great characteristic that I find to be influential with jurors, on the part of the lawyer, is sincerity. I have heard some of the most polished speakers in America enthrall jurors for hours with their eloquence, and a crowded Court room hang upon every word, and yet I have seen time and time again jurors go out and bring in adverse verdicts, because the days when men's emotions were so worked upon as to be swayed by eloquence have to a great extent passed,—the palmy days of eloquence, as it was understood in years gone by, no longer exist. What the causes for its decline I am not prepared to say, but we may consider in some respects the great widespread educational influence that has gone throughout the country, the rise in power of the newspaper

press. The great centers of population in which men are engaged in mercantile pursuits to-day differ very much from the time when men would leave their agricultural pursuits and come in for days and days to listen to a lawyer's eloquent pleading. To-day a juror wants to hear the lawyer who will get at the facts; judges have become notorious in their desire to quell these exuberances that used to be tolerated, if not encouraged, and to have the lawyer get down to the point, for that is a necessity. Times were when few cases came before judges—few cases of any importance—when they could devote time to listen to the lawyer and time to study up the authorities and to dwell upon the principal points at issue. Now, take it in our busy centers—how different—take the city of New York; in one branch of the Special Term that used to be called chambers, hearing simply motions, there are on any one day during the whole term from a hundred to a hundred and fifty litigated motions to be heard by a judge, argued and briefs submitted. It is beyond human power for a judge to give to each of those motions that care and thought that their importance possibly requires, and therefore in order to get through the immense mass of business, the immense increase of litigation that we find upon every hand, it has become of great importance and of the greatest importance that lawyers should learn conciseness in their presentation of cases and that ability, to use the vernacular, to come to the point.

I was speaking of the lawyer in Court who pays no attention to these points, and who considers himself of prime importance. They are not few. If they were but few I would not speak of them, but my observation is that they are numerous, and how short-sighted the lawyer is to think that because he can make an impression upon men in the jury box or men in the Court room, as being a sharp lawyer, that that tends to his own reputation. It may within certain limits, but in the long run, I assure you, my friends, that the successful lawyer before the Bar is a man that can carry a note of sincerity in every word he says.

I might depart from that subject for a moment to say something of oratory. I have in my mind's eye now some of the most accomplished orators in the United States, men who can charm, not only by their dictum, but by the intensity of their delivery and the grace of their action, and yet when they finish their magnificent speech, not an idea remains, not a thought is suggested—nothing remains of their magnificent oration, because

their hearers feel that they are great artists and are not sincere, and if we look over the vast domain of history for a moment, we will see that the greatest orators in the world were men who spoke from a sincere heart. Every man who is quoted to-day, whose sayings stand before us as lessons in light, every one of those in his day was noted for his sincerity. We may admire some of the orations of Demosthenes and Cicero, and admire them as beautiful rhetorical compositions, but they do not impress us as the sayings of other men. They do not impress us as the sayings of some of the Christian Apostles, unlettered man though they were, because there are so many flowers of rhetoric that there is very little soil behind them, and if there is any profession in the world that is more susceptible to that, it is the profession of the law.

In the matter of the examination of witnesses, I wish our law schools, and I say this with great deference to our distinguished dean here to-night, and the faculty—I wish that they would give some attention to indicate to the students the lines of action with regard not only to their deportment in Court and to judge and jury, but to the handling and examining of witnesses.

It is apparently an easy matter for a lawyer to conduct a direct examination. He wants to prove his own case by his own witness. He has a willing witness, and it is almost a universal vice at the bar for a lawyer with a willing witness to lead that willing witness with what we all understand as leading questions. If it were considered for a moment how suspicious juries are of a willing witness in the hands of counsel who leads him and suggests the answer to the question. It is considered a very easy matter to examine a willing witness, but to examine a witness and to avoid the dangers of a good objection and to avoid the equally great danger of impressing the jury with the belief that the witness is too willing is another matter. A lawyer goes on and he runs question after question, and he connects them all by the conjunction. He is not satisfied that the witness can state the case or should answer his question, but he runs his questions one into the other, "And then what did you do?" "And then did you see him?" "And then what did he say?" "And then what did you say?" Just running one question into the other, and all the time leading the witness in the way he wishes him to go. Of course the great danger of that method is apparent. It invites objections. It creates an atmosphere of suspicion of the truth of the

testimony given. How beautifully Cicero puts that! I do not attempt to quote him literally, but he said: "I consider it my duty to question my witness upon a few particulars, to refrain from questioning him upon matters unimportant, and never to question, if I can avoid it, an adverse witness for fear I should give him the opportunity of doing my client's cause harm and injury."

There is, in the examination of witnesses, an evil habit in many lawyers of proving too much, of going beyond the legal requirements in the case, of not being satisfied to prove the kernel of their contention, but to go on and on and on, fatally leading them to some terrible blunder or mistake—like in pleading, where that case arose in Nova Scotia where a ship was insured, and the underwriters put as a condition in the insurance that they should be liable on her voyage provided that she did not touch at certain ports at that time infected with yellow fever. Now, the ship was lost. The complainant suing the underwriters set out that the ship did not touch at the prohibited ports, and in trying his case he brought testimony to show that the ship did not touch at the ports prohibited in the policy. Counsel failed to see that he was not called upon to do that, and it was when the judge pointed out to him the error of his practice, it was too late that he saw it. The responsibility for that rested upon the defense. It was for them to show that she touched at those prohibited ports in order to void the policy, not for him to show it; but instead of that, with a fatality that seizes many lawyers in Court, he went on and proved what he was not called upon to prove. He proved his antagonist's case, for the very things that he sought to prove, that the ship did not touch the prohibited ports enabled his antagonist on the cross-examination of the witnesses to show that she did, and he lost his case. I speak of that as illustrating the necessity on the part of the young practitioner particularly to not only construct his pleadings in as sharp and direct manner as possible to the point in issue, but also to limit the examination of his witnesses, for he thus protects himself if he does not open the gate to his adversary, and at the same time does not give a possible erroneous impression as to his motive.

It should also be observed by the young lawyer that in examining his own witnesses he should be careful in his manner. Witnesses are brought into Court, very many of whom have never been in Court before—women particularly are naturally nervous and their surroundings are new. They are in a position where

they are the cynosure of all observers. They are put there and the solemnity of an oath of course has an influence upon them. The lawyer feels at home. He is not excited in any way. It is his profession. The witness from whom he wishes to elicit evidence to support his case is excited and he fails to recognize that fact if he approaches that witness in a manner to which he is unaccustomed. The essential thing for him to do is to inspire that witness with confidence, to allay emotion, to satisfy the witness there is no cause for alarm, to feel a reliance upon the counsel who propounds the question. How many lawyers have we heard who propound a question and when midway in the question they will withdraw it and change it, thus confusing the witness and the jury. If the questioner does not know what he wants, how can the witness know what to respond? When the questioner puts forth a question and then stops short and says: "No, I withdraw that, I change that," there is uncertainty instilled into the mind of the witness, and we must recognize human nature. The witness must necessarily depend for guidance upon counsel; the client must rely upon his counsel, and if his counsel shows lack of confidence and self-possession, coolness and calmness of demeanor, how can the witness be expected to show it? It is so hard in practice for a lawyer—apparently hard—to put a clear-cut, concise question that admits of an answer without appearing to lead the witness or to suggest the answer. Then we come to the great point of cross-examination. Oh, how many men I have seen convicted on cross-examination. It is a sword of justice but it rarely is a shield. It should be a shield, but in practice it rarely ever is.

There was a time when a man accused of crime would not be allowed to testify in his own behalf—and while there are many old laws that needed change, yet almost without exception they were the growth of centuries and founded upon some strong directing principle, and the principle upon which that exclusion was founded was that a man accused of crime if allowed to testify in his own behalf would commit perjury to save himself, and in order to save the temple of justice from the profanation of perjury, the law said he shall not be allowed to testify because he would perjure himself. Now, in our so-called humane days, that law has been abrogated and an accused is allowed to testify in his own behalf. I assure you, my friends, that after many years experience both at the bar and on the bench, I question the wisdom of that law, to this extent: That for the innocent man

it is a great protection and a great opportunity. For the guilty man it is a peril of the greatest magnitude. I can say it with absolute conviction of the truth of my words, that I have never seen an innocent man convicted who had taken the witness-stand in his own behalf, and I have never known a jury who were not convinced of his innocence by his own statement. On the other hand, I have never seen a guilty man take the witness-stand in his own behalf but was convicted on his own cross-examination. The reason for that is apparent. It is almost superhuman work to extinguish truth and to erect falsehood in her place. The most carefully constructed stories are liable to be shattered by cross-examination. The unskillful lawyer has unconsciously, no doubt, convicted more of his clients than ever the skillful prosecutor has. The lawyer seems to be possessed of the idea that he must earn his fee, and that the only way that he can impress his client and his client's friends with a conviction that he has earned his fee is by a forensic display. What a temptation it is to ask questions, but what a great accomplishment it is to a lawyer to know when to sit down. It is a human weakness and that weakness is emphasized by the professional desire to shine. If the lawyer does not conduct his case in such a way as to abuse the other side, he will not please his client. Right there, parenthetically, I will point out a course of practice in our country, the wisdom of which is at least questionable, and that is the difference between our practice and the English practice. In England, the barrister who pleads rarely ever comes in contact with the client. Indeed, it is considered unprofessional that he should. The only one that he comes in contact with is the attorney or solicitor, and he takes from the attorney or solicitor the brief. The attorney or solicitor has direct contact with the client. The barrister never has recourse to the client to obtain knowledge or information about his case. He has recourse in all instances to the solicitor or attorney who sits at his side. The attorney or solicitor acts as a buffer or breakwater between the client and the pleader. Every lawyer of any practice knows the trying times he has sometimes with his client who prompts him with questions to put to an adverse witness—partners, for instance, who have been many years friends in business and life, quarrel; they go to law, and they become bitter enemies, and if partner No. 1 goes on the witness-stand, partner No. 2 will insist that his lawyer shall bring out matters and put questions to part-

ner No. 1 that have nothing at all to do with the case in litigation. They may have something to do with their private lives; may have something to do with some little blemish in their lives, and yet the client will not be satisfied unless that question be put to satisfy his own malignity. It is a difficult thing for a lawyer to resist the pertinacity of that client. Manifestly he wants to please his client. Manifestly he does not want his client to have the impression that he has sold out the case or betrayed him, or that he is weak and incompetent to deal with the lawyer on the other side. In the English practice such a situation can never present itself, because if the litigant whispered any suggestion of that character, he can only whisper it to the attorney, and the attorney, as I say, being a sort of buffer or breakwater, has knowledge and sense enough not to trouble counsel with it. Counsel never hears about it. The counsel confines himself to the pertinent and relevant facts of the case. Of course, on the other hand, it is said under our American system, the counsellor having come in contact with the client knows more about his case than the counsellor at the English bar, but I am not prepared to give my opinion one way or the other. I simply point to the distinction that exists between the two systems of practice and the advantages or disadvantages that may accrue to each; but, at all events, we have in our Courts that danger, that a lawyer has always to meet, and if there is one thing that the young lawyer should cultivate as well as many others, it is his self-possession and his mastery of his position as a lawyer; his ability and his courage to say to his client: "That has nothing to do with this case; I decline to question", or "I decline to abuse; I decline to make myself an instrument to vent your wrath or malignity, and if you do not like the way that I try your case, I throw up my retainer". He might lose one case. He might lose one client, but his reputation would be enormously magnified, for it would travel, and if there is one thing that can stand to a young lawyer more than the other it is the reputation of being his own master. I was speaking about cross-examination—the wonderful, wonderful art that cross-examination is—the art and the skill that enables a man to put a driving question home without opening the gates to his adversary. Under our rules of evidence the gates are closed to all irrelevant or immaterial or incompetent matters resting in hearsay, and that is for the exclusion of everything that will be calculated to prejudice or sway unduly, and designed

as a means to reach the truth by the most direct route possible. The lawyer on cross-examination is not bound by those strict rules that the lawyer on direct examination is, but, the very freedom that he enjoys is most dangerous unless it is enjoyed intelligibly and used properly. He himself can open the gate where his adversary could not, and woe unto the lawyer who opens the gate to his adversary, because he cannot close it when he wants to. He may ask a question that will open up a whole range of subjects that will be injurious to him, of great detriment to his case and be fatal to it, but he cannot close the gates. If he once opens those gates, they are beyond his power and control, and hence the great process of cross examination in our Courts should be used and exercised with the greatest precaution. It would be far better for the lawyer to refrain putting questions than to indulge in a volume of questions that really have no point nor meaning.

Lawyers seem to be under the impression, "I must examine, I must cross-examine; if I don't cross-examine I will not be regarded as a bright lawyer; I will not be able to impress my client and his friends with my capacity. I must do this in order to justify my retainer; to strengthen my reputation I must do this, and I must show myself." Oh, if he only thought, if he only thought of the injury that he is doing to his client's case and to his own reputation!

I have before observed that instead of a lawyer cultivating a habit of questioning without motive, it would be infinitely better if he sat down without asking a question at all, and I have observed that some of the masters of the profession, some of the giants at the bar, to the great disappointment of a gaping audience in Court, who expected a display of intellectual fireworks, have sat down and said, "No questions." How much wisdom; what self-restraint; what keen knowledge of human nature; what great judgment of the situation are all involved in that one act, "No questions"!

I do not know, Mr. Dean, that these hurried and fugitive observations on my part will be of any use or benefit, but if they cause one drop of thoughtful consideration with my young friends here who propose to pursue the honorable profession of the Bar, I will be well paid for coming to New Haven this evening. If anything that I have said and called to your minds will enable you to avoid in the future some of the pitfalls I have

pointed out to the practicing lawyer, then my visit here will be well repaid.

I said, when first addressing you, that I would not attempt to speak on those subjects regarding substantive law, which you hear from your teachers and professors. I am not competent in the first instance, and I am not disposed in the second. I have directed my observations to fellow practitioners and those who if not practicing now will be in years to come, and I venture to say that every young man whom I have addressed to-night, every one who is within hearing of my voice, will, in the years to come, when they have practical demonstration of these things of which I speak, these things which cannot be read of in the books, these things which only the hard school of experience can teach, that you will remember this night and remember something that I have said in relation to this subject.

I have but a word to say in conclusion, that this has been a great pleasure to me to speak as lawyer to lawyer, to speak to young men, as I have been a young man myself and have had to make my way at the Bar and learn as I went along. Never put aside the slightest item of knowledge that you can acquire. Never reject an opportunity to learn something by experience. The knowledge which you acquire in college forms a rich mine. It may, like the gold mine in the mountain, remain unworked. The gold in the mountain is of no use to mankind unless it is worked, unless it is developed, and no matter how much knowledge or learning you may possess, unless you know how to use it, and use it to the best advantage, use it for the interests of your clients, that knowledge and culture will never benefit you much. It is a profession to which every one of its members should accord the greatest devotion and fidelity. There is nothing in human experience or within the compass of human action that does not come within the domain of the work of the lawyer at some time or other in his life. It is the most all-pervading of professions and it being so, it calls upon its votaries to give to it the greatest loyalty that man can give to an ideal, because after all, it is an ideal.

The commercial prospects and purposes which I spoke of, while of course it is important in the rush and stress of modern life, for living is necessary, should not be the sole and exclusive object. There is a nobility of purpose involved in the profession of the law. There is a chivalry of action. It may

be called into play any day. The idea that a man can stand forward and become the advocate of some person who cannot speak for himself, who will have the courage and boldness to defend liberty from an assault upon her citizen, who will have the strength of character to denounce a wrong, and who after all will remember that while he owes a great duty to his profession, he is called upon to give a corresponding duty to his country, and that is one of the reasons why the profession to-day is the subject of so much criticism—because of their activities and their intellectual excellence, lawyers have forged to the front in public affairs; they form a large percentage of our legislators; they enact too many laws; they have become the servitors of great trusts and corporations, not as lawyers, but as agents. The law has been made a cloak for doing things that will not stand the test of daylight or the rule of ethics in any walk of life. Men have become lawyers for the sole purpose of taking sums of money that were in fact bribes, but given in the guise of fees. The law protects a lawyer from disclosing the secrets of his confidential relations with clients. How frequently has that been abused! How frequently has a man who has possibly never tried a case in Court in his life been able to refuse to give any information as to how certain large fees reached his pockets and from whom, upon the ground that it was a professional secret and privileged. It is such practices as these that have brought the popular criticism upon the profession of the law that to-day exists, and if there should be one mission above another that would place itself in front of every young aspirant for forensic honors at the bar, it is that he should be not only a true and faithful lawyer, devoted to the application of his profession, faithful to the trust reposed in him, but that he should take advantage of the prominence that the profession of the law gives him over his fellow citizens, by giving his services to his country and to the administration of justice in a way that is conducive to right and justice.

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